U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: APR 0 3 2015 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition and the Administrative Appeals Office (AAO) dismissed the subsequent appeal. Counsel has filed three motions to reopen and reconsider our decision. We dismissed the motions and affirmed our initial decision. Counsel has now filed a fourth motion to reopen and reconsider our decision. The fourth motion to reopen and reconsider will be granted. We will treat this motion as a motion to reconsider. Our previous decisions will be affirmed. The appeal is dismissed and the petition remains denied.

The petitioner describes itself as a low income housing tax credit – residential housing limited partnership. It seeks to permanently employ the beneficiary in the United States as a tax credit administrator. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1]

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is July 31, 2002. *See* 8 C.F.R. § 204.5(d).

Our decisions dismissing the appeal and the subsequent motions conclude that the beneficiary's education does not meet the minimum requirements of the labor certification or the requested immigrant visa preference classification.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal and motion.[2]

The procedural history in this case is documented by the record and incorporated into the director's decision and our previous decisions on appeal and motions. Further elaboration of the procedural history will be made only as necessary.

The instant motion qualifies for consideration as a motion to reconsider because the petitioner asserts an error in the application of law in that the beneficiary possesses a bachelor's degree and five years of progressive post-baccalaureate experience.

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

[1] Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees, whose services are sought by an employer in the United States.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

In evaluating the beneficiary's qualifications, U.S. Citizenship and Immigration Services (USCIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position.

Madany, 696 F.2d at 1015. USCIS interprets the meaning of terms used to describe the requirements of a job in a labor certification by "examin[ing] the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]" even if the employer may have intended different requirements than those stated on the form. *Id.* at 834 (emphasis added).

The beneficiary must also meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION
Grade School: N/A.
High School: N/A.
College: 6 years.
College Degree Required: Master's or equivalent.
Major Field of Study: Business Administration or relevant field.
TRAINING: None Required.
EXPERIENCE: None Required.
OTHER SPECIAL REQUIREMENTS: None.

The record demonstrates that the beneficiary possesses a Master's degree in Personnel Management and Industrial Relations from [redacted] India, completed in 1991, and a Master's Degree in Economics from [redacted] India, completed in 1988.

Our previous decisions discussed our review of the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), noting that EDGE's credential advice provides that the beneficiary's Master's Degree in Personnel Management and Industrial Relations and his Master of Arts in Economic, represent the attainment of a level of education comparable to obtaining two bachelor's degrees in the United States. Based on the conclusions of EDGE and the evidence in the record, we conclude that the beneficiary possesses the foreign equivalent of two bachelor's degrees earned from an accredited U.S. college or university.

Our previous decisions have further concluded that the terms of the instant labor certification do not indicate that a combination of education and experience, such as that defined in 8 C.F.R. § 204.5(k)(2), is an acceptable alternative to the required Master's degree. Therefore, the beneficiary does not meet the minimum requirements for the proffered position as set forth on the labor

certification.

We have also noted that, even if the petitioner had indicated that it would accept a combination of education and experience in lieu of a U.S. master's degree or foreign equivalent degree, the record does not establish that the beneficiary possesses the equivalent of an advanced degree (a Bachelor's degree and five years of progressive post-baccalaureate experience) pursuant to 8 C.F.R. § 204.5(k)(2), as claimed by the petitioner.

On motion, the petitioner asserts that we should uphold the appeal because the beneficiary is eligible for approval based on the plain language of INA § 203(b)(2) and 8 C.F.R. § 204.5(k)(2). Further, the petitioner asserts that we should approve the petition because the beneficary can use experience earned with petitioner.

The petitioner asserts that § 203(b)(2) of the Act and 8 C.F.R. § 204.5(k)(2) do not limit the application of the term advanced degree professional for individuals possessing a U.S. bachelor's or foreign equivalent degree and five years of progressive post-baccalaureate experience only to situations where this is specifically stated on the Form ETA 750. Counsel references letters dated January 7, 2003 and July 23, 2003, respectively, from of the INS Office of Adjudications to counsel in other cases, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. 204.5(k)(2).

As we have noted, private discussions and correspondence solicited to obtain advice from USCIS are not binding on us or other USCIS adjudicators and do not have the force of law. *Matter of Izummi,* 22 I&N 169, 196-197 (Comm'r 1968); *see also,* Memorandum from Acting Associate Commissioner, Office of Programs, U.S Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

Additionally, although 8 C.F.R. § 204.5(k)(2), as referenced by counsel and in Mr. correspondence, permits a certain combination of progressive work experience and a bachelor's degree to be considered the equivalent of an advanced degree, neither the regulation or the correspondence exempts the petitioner from demonstrating that the beneficiary meets all of the requirements of the offered position set forth on the labor certification by the priority date of the petition.[3]

The petitioner asserts that the beneficiary qualifies for the offered position based on experience as:

- General Manager/ Tax Credit Administrator with the petitioner from January 1999 until present.
- Senior Personnel Manager with in India from August 1995 until February 1996.
- Senior Personnel Administrator with from July 1991

[3] 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

until July 1995.

The petitioner relies on an experience letter from the petitioner's President/General Partner stating that the company employed the beneficiary as a Tax Credit Administrator from January 28, 1998 until August 20, 2012. However, we have previously concluded that the letter cannot be used to establish the beneficiary's progressive work experience because the work experience was earned with the petitioner in the position offered. This position is supported by the Board of Alien Labor Certification Appeals (BALCA). *See Delitizer Corp. of Newton,* 88-INA-482, May 9, 1990 (BALCA). *Delitizer* determined that 20 C.F.R. § 656.21(b)(6) does require that employers establish "the 'dissimilarity' of the position offered for certification from the position in which the alien gained the required experience." *Delitizer Corp. of Newton,* at 4. In its decision, BALCA stated that Certifying Officers should consider various factors to establish that the requirement of dissimilarity under 20 C.F.R. § 656.21(b)(6) has been met, and that, while Certifying Officers must state the factors considered as a basis for their decisions, the employer bears the burden of proof in establishing that the positions are dissimilar. *Delitizer Corp. of Newton,* at 5. In the instant case, the beneficiary did not represent on Form ETA 750, Part B that he had been employed with the petitioner in any position other than the proffered position. In order to utilize the experience gained with the employer, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. *See Delitizer Corp. of Newton.* Therefore, we cannot consider the beneficiary's experience gained with the petitioner as qualifying experience to meet the requirements of the labor certification by the priority date.

The petitioner asserts that the adjudication standards applied by the DOL are different than USCIS and that "there is nothing that precluded the Beneficiary from meeting the Master's Degree requirement before the DOL and the alternate Bachelor's Degree and 5 years of experience requirement with experience earned with the Petitioner before USCIS." The petitioner provides no legal authority for this assertion.

Representations made on the certified Form ETA 750 clearly indicate that the actual minimum requirement for the offered position is a "Master's or equivalent degree in Business Administration or relevant field." As the actual minimum requirement is a master's degree, the petitioner could not hire workers with less than a master's degree for the same position. *See* 20 C.F.R. § 656.21(b)(5) [2004].[4]

The petitioner asserts in its September 11, 2012 experience letter that the beneficiary's experience was gained as a Tax Credit Administrator (the proffered position) with substantially similar job duties. Experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without evidence that the DOL conducted a *Delitizer*

[4] In hiring a worker with less than the required experience for the offered position, in violation of 20 C.F.R. § 656.21(b)(5) [2004], the employer indicates that the actual minimum requirements are, in fact, not as stated on Form ETA 750. Rather, in that the beneficiary was hired in the offered position with less than a master's degree, it is evident that the job duties of the offered position can be performed with less than the education requirement listed on Form ETA 750. Therefore, it is not established that a master's degree is the actual minimum requirement for the offered position.

analysis of the dissimilarity of the position offered and the position in which the beneficiary gained experience with the petitioner.

As discussed above, in order to utilize the experience gained with the employer, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. *Delitizer Corp. of Newton,* 88-INA-482, May 9, 1990 (BALCA). The petitioner failed to establish the dissimilarity between the position the beneficiary previously held with the employer and the permanent position offered. Therefore, we cannot consider the beneficiary's experience gained with the petitioner as qualifying experience to meet the requirements of the labor certification by the priority date.

In general, experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without invalidating the actual minimum requirements of the position, as stated by the petitioner on the Form ETA 750.

There is no regulatory-prescribed evidence in the record of proceeding demonstrating that the beneficiary is qualified to perform the duties of the proffered position, as he does not possess a master's or equivalent degree. Even if we accepted that the labor certification allowed the beneficiary to qualify based on a bachelor's degree and five years of progressive post-baccalaureate experience, a position we do not accept as noted herein, there is also no regulatory-prescribed evidence in the record to demonstrate that the beneficiary possesses the required five years of experience.

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Beyond the petitioner's experience letter, the record contains the following:

- An experience letter from Vice President (Operations) and Factory Manager on India letterhead stating that the company employed the beneficiary as an Assistant Manager (Personnel) from August 1995 to February 1996.

- A copy of the beneficiary's hiring documents with , India. These documents establish that the beneficiary was employed as a Personnel and Administration Officer from August 1, 1992 to July 28, 1995.

- Two affidavits drafted by the beneficiary on October 8, 2012, providing his job duties with India and India

The record does not include any evidence demonstrating that the beneficiary's job duties as Assistant Manager (Personnel) and Personnel and Administration Officer represent experience relevant to the field of business administration or to the proffered position of Tax Credit Administrator.[5]

Therefore, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion is dismissed. The petition remains denied.

[5] Even if we accepted the beneficiary's affidavit describing his prior experience, we note that the beneficiary may have earned a total of three years and six months of qualifying experience.